(2009) 05 JH CK 0067

In the Jharkhand High Court

Raj Kishore Verma APPELLANT

Vs

The State of Jharkhand and Others RESPONDENT

Date of Decision : 01-05-2009

Acts Referred:

Bihar/Jharkhand Pension Rules, 1950 — Rule 43 B

Citation : (2009) 05 JH CK 0067

Hon'ble Judges : D.G.R. Patnaik, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.G.R. Patnaik, J.—Heard the learned Counsel for the petitioner and JC to GP III appearing on behalf of the respondents and with the consent of the learned Counsel for the parties, this application is taken up for disposal at the stage of admission itself.

2. The petitioner has challenged the order dated 15.2.2008 (annexure 4) passed by the respondent No. 3 as also the order dated 27.5.2005 (annexure 1) whereby the respondents have recovered a sum of Rs. 90,000/- (rupees ninety thousand) from the retired benefits of the petitioner and have also directed him to pay Rs. 13,325/- by way of challan. Besides praying for quashing the aforesaid two orders, the petitioner has also prayed for issuance of a direction to the respondents to refund the amount forthwith and also to pay him consequential benefits including pension on the scale of pay last drawn by him at the time of his retirement.

3. Facts of the case of the petitioner, in brief, are that he joined on the post of Assistant in the office of the Deputy Commissioner, Ranchi, on 18.5.1966. After having served for 38 years, he superannuated from service on 31.5.2004 on the post of Head Assistant on the scale of Rs. 5500-900/- after being granted promotion under the second ACP.

Post retirement, he demanded his retiral benefits , bit by the impugned letter dated 27.5.2007, he was informed that a sum of Rs. 90,900/- (rupees ninety thousand) was recovered from his retiral benefits and he was also directed to pay a sum of Rs. 13,325/- by way of challan, on the ground that the aforesaid amount was excess payment received by him.

He filed a representation on 4.1.2008 before the concerned authority of the respondents taking support of the judgment passed by the Full Bench of this Court in LPA No. 146 of 2006, demanding payment of his entire retiral benefits. In response to his representation dated 4.1.2008, he was informed through the impugned letter of the respondent dated 15.2.2008 (annexure 4) that the amount being excess payment received by him, was recovered from his retiral benefits.

4. Assailing the impugned order, Sri A. Sen, learned Counsel for the petitioner would submit that the impugned orders having been passed long after the petitioner''s retirement and that too without serving any show cause notice nor giving any opportunity of hearing to the petitioner against the proposed recovery and even without conducting any enquiry under the provisions of Rule 43 B of the Bihar/Jharkhand Pension Rules, the same is illegal, arbitrary and against the principles of natural justice and cannot be allowed.

Referring to the Full Bench judgment of this Court in the case of Laxman Prasad Gupta v. State of Jhakrhand 2007 (4) JLJR 459 (FB) and the case of Smt. Normi Topno Vs. The State of Jharkhand and Others, , learned Counsel argues that an identical issue has been decided by the Full Bench of this Court in the aforesaid two cases in which it was categorically held that without taking recourse to the provisions of Section 43B of the Bihar/Jharkhand Pension Rules, no amount can be recovered from the retiral benefits of a retired employee.

5. The respondents in their counter affidavit have denied and disputed the claim of the petitioner. Learned Counsel for the respondents would submit that the salary of the State Government employees were revised with effect from 1.1.1996 pursuant to the notification issued by the Finance Department, Govt. of Bihar, Patna dated 8.2.1999. The notification had also specified Department-wise and Post-wise pay scales in Schedule III of the Resolution. As per paragraph II of the Resolution, the State Government had decided to abolish the scheme of time bound promotions and selection grades with effect from 1.1.1996,

The revised pay scale of an Assistant/Clerk as mentioned in Schedule III of the resolution was fixed at Rs. 4000-100- 6000/-. As against this, the petitioner who was admittedly employed as a Clerk, his pay was wrongly fixed in the revised scale of Rs. 5000-8000/- w.e.f. 1.1.1996 and salary on such scale was paid to him though after obtaining an undertaking from him, as per the instructions contained in the notification of the State Government in the Finance Department, that any excess payment found to have been made as a result of incorrect fixation of pay or any excess payment detected in the light of discrepancy subsequently, will be refunded by him to the Government either from arrears of pay bill in one lump-sum or adjustment against future payments due to him, including pension and gratuity. Error in fixation of pay of the petitioner was detected subsequently and upon such detection, the excess amount which was received by the petitioner was assessed at Rs. 91,252/- which was recovered from the petitioner and this amount was adjusted on 15.2.2008 against un-utilized leave encashment amount vide the impugned order issued by the District Establishment Deputy Collector, Ranchi (respondent 3).

It is also explained that in the light of the instructions contained in the Government resolution dated 14.8.2002 issued by the Finance Department, Govt. of Jharkhand, Ranchi, the petitioner was given the benefit of the 1st and 2nd time bound promotion in the pay scale of Rs. 5000-8000/- and Rs. 5500-9000/- respectively under the ACP scheme from 9.8.1989 and accordingly his pay, pension and gratuity was fixed and sanctioned by the Accountant General, Jharkhand. Pension payment order and order for payment of gratuity was accordingly released in favour of the petitioner and forwarded to the Treasury officer, Ranchi with a corresponding copy addressed to the petitioner.

Learned counsel would argue further that the excess amount paid to the petitioner as an incorrect fixation was therefore legally recoverable from his retiral benefits and the petitioner''s case does not come within the purview of Rule 43B of the aforesaid pension Rules.

Relying upon the judgment of this Court in the case of Arun Kumar Kashyap Vs. State of Jharkhand and Others, learned Counsel would submit that since the mistake was apparent on the face of record and the erroneous fixation was subject to revision, the respondents had authority to rectify the mistake and recover the amount of excess payment and in this view of the matter, there was no necessity for giving an opportunity of hearing to the petitioner before proceeding to recover the excess paid amount.

6. From the admitted facts, it appears that the amount sought to be recovered from the retiral benefits of the petitioner is claimed to be the excess payment received by him. Such excess payment was made on account of error in fixation of the revised pay scale of the petitioner with effect from 1.1.1996. It is not alleged that such purported mistake in fixation of the revised pay scale was occasioned on account of any fraud or misrepresentation practised by the petitioner. Furthermore, as long as the petitioner continued to remain in service, he was never informed of such mistake in fixation of his revised pay scale and on the other hand, upon granting him benefit of two ACPs, his pay scale was fixed at a higher scale. Accordingly, his salary which he had drawn at the time of retirement was on the basis of salary fixed after giving him the benefit of ACP.

The questions of law raised by the petitioner are:

(i) whether recovery of any amount from the retiral benefits of the petitioner on the ground of excess payment can be made without giving him opportunity of being heard against the proposed recovery ?

(ii) whether in absence of any inquiry under rule 43B of the Pension Rules and in absence of any finding to the effect that the petitioner had withdrawn the purported excess salary by practising fraud and/or misrepresentation, the action of the respondent directing recovery of the purported excess payment from his retiral dues is justified?

7. In the case of Batliboi Employees'' Union Vs. Batliboi and Co. and Another, and also in the case of Union of India Vs. IRSS Association, (1995) Suppl. (3) SCC 600 , and later, in the case of Union of India and Others Vs. Smt. Sujatha Vedachalam and Another, the Supreme Court has held that excess payment made to the workmen beyond what they were entitled are recoverable from the workmen, though by way of equitable distribution or adjustment from future payment. Such excess payment can be recovered from the salary of an employee who is in service though not from those who have already retired.

8. While deciding a similar issue in the case of Sahib Ram Vs. State of Haryana and Others, the Supreme Court has observed that though excess payment was wrongly made to the employee, it was not on account of mistake or misrepresentation by the employee, but it was on account of mistake by wrong construction made by the Principal and for this the employee cannot be held to be responsible and as such the amount paid to the employee cannot be recovered from him.

9. In the case of Shri Shekhar Ghosh Vs. Union of India (UOI) and Another, the Supreme Court had emphasized the requirement to comply with the principles of natural justice and had set aside the order of rectification of the mistake in making excess payment of salary made without affording opportunity of hearing to the employee.

10. In an earlier judgments rendered in the case of Ram Ujarey Vs. Union of India, the Supreme Court has observed in the following terms:

It is not denied or disputed that even when a mistake is sought to be rectified, if by reason thereof, an employee has to suffer civil consequence, ordinarily principles of natural justice are to be complied with.

Requirement to comply with the principles of natural justice would, therefore, vary from case to case. If upon giving an opportunity of hearing to an affected employee, it is possible to arrive at a different finding, the principles of natural justice must be complied with....

11. Obtaining guidance from the observations of the Supreme Court in the judgment rendered in the case of Ram Ujarey (supra) and in the light of the facts and circumstances of the case, this Court in the case of Arun Kumar Kashyap (supra) had occasion to record its observation in the following terms:

In the facts and circumstances of the case, there was therefore no necessity of giving an opportunity to the petitioner of being heard before order of revision and re-fixation of his pay urns passed by the impugned order. Even though facts may not suggest active misrepresentation on the part of the petitioner, yet the fact that the petitioner despite being all along aware of the mistake in regard to fixation of his pay, did not point out the anomaly on hip own and continued to receive the excess amount which was not legitimately due to him, may be treated as a deliberate suppression of material fact.

12. The above observation in the case of A.K. Kashyap was made on consideration of the fact that the writ petitioner was still in service and it was brought to his notice that he had drawn excess payment by wrong fixation of his pay scale and also in the context of the fact that there was reason to believe that he was aware of the error in the pay fixation by virtue of which he had drawn excess payment. Furthermore, such payments were sought to be recovered from his future salary.

13. In the present case, even tough the error in fixation of revised pay scale of the petitioner from 1.1.1996 was apparent on the face of it by reference to the pay sale of different categories of the employees stipulated in the in the notification of the State Government in the Department of Finance, but rectification of the error was not made by the concerned authority even till after the retirement of the petitioner from service. Herein lies the difference between the case of the petitioner and the case of A.K. Kashyap (supra). . Once an employee has retired from service, recovery of any amount on the ground of excess payment can be made only by resorting to the provisions of Rule 43B of the aforesaid pension Rules. This principle of law has been emphatically stressed by the Full Bench of this Court in the case of Normi Topno (supra). Even in the case of Batliboi Employees Union (supra), the Supreme Court has though held that excess payment is recoverable, but has also observed that such recovery could be made only by way of equitable distribution by adjustment against future payment. This has been further clarified in the case of Union of India v. Indian Railway Staff Association (supra).

14. It is therefore well settled from the above noted judgments of the Supreme Court as also from the Full Bench judgment of this Court that excess payment received by any employee beyond what he was legitimately entitled to can be recovered from his salary if he continues to remain in service, though such recovery cannot be permitted if the employee has already retired and the process of recovery was not initiated prior to his retirement.

15. As observed herein above, it is not the case of the respondents that in drawing the excess payment, the petitioner had practised any fraud or misrepresentation. It is also not the case of the respondents that the petitioner was in such official capacity in which it could be presumed that he was all along aware of any error in fixation of his revised pay scale with effect from 1.1.1996.

16. In view of the above discussions, both the question as raised by the petitioner are answered in his favour. The respondents cannot proceed to recover the purported excess payment from the retiral benefits of the petitioner without

resorting to the procedures established by law.

17. For the foregoing reasons, I find merit in this writ application. Accordingly, this application is allowed and the impugned orders dated 15.2.2008 (annexure 4) and the order dated 27.5.2005 (annexure 1) are hereby quashed.

The respondents are directed to refund to the petitioner, within a period of two months from the date of this order, the sum of Rs. 90,000/- (rupees ninety thousand) which has been recovered from the retiral benefits of the petitioner.

Let a copy of this order be given to the learned Counsel for the respondents.